LIM KONG YENG

v.

YAP WEE YING

HIGH COURT MALAYA, RAUB
V.C. GEORGE J
[CIVIL SUIT NO. 20 OF 1978]
4 DECEMBER 1981

DAMAGES: *Personal injury - Injuries to 15 years old Form 1 pupil - Several injuries inflicted in one incident - Pain and suffering experienced over the same period - Whether there must be reduction of the aggregate amount to compensate for overlapping - Question of loss of earning power.*

The 1st plaintiff, a 15 years old Form 1 pupil suffered injuries namely (1) a laceration on the chin (2) a laceration on the left cutting through the muscles and exposing the leg bones and (3) a fracture of the left tibia and fibula as a result of a motor accident. He was in hospital from 9 June 1976 until 4 September 1976. He filed the action for damages through his father and next friend, claiming general and special damages.

Held:

[1] Since all the injuries were inflicted in one incident and since the 1st plaintiff experienced the pain and suffering for all of them over the same period there must be reduction of the aggregate amount to compensate for overlapping.

[2] Considering that the 1st plaintiff is still pursuing with his studies and had not offered himself into the labour market brings to mind the various contingencies that have to be taken into account that would water down any award made under loss of earning power.

[Judgment for the plaintiffs.]

Cases referred to:

Paramasivam & Anor. v. Abdul Aziz & Ors. [1976] 2 MLJ 91
Hapiz bin Abd. Manaf v. Pang Swee - Civil Suit 161/75
Mohamed Ikhawan v. Johar & Anor. [1966] 1 MLJ 180

For the plaintiffs - K. Pasupathy
For the defendant - N.A. Marjoribanks

JUDGMENT

V.C. George J:

The injuries suffered as a result of a motor accident by the 15 years old 1st plaintiff when he was 9 years of age were (1) a laceration on the chin (2) a laceration on the left leg cutting through the muscles and exposing the leg bones and (3) a fracture of the left tibia and fibula.

He was in hospital from 9 June 1976 until 4 September 1976. I quote from the report of the surgeon Mr. Mahmood Merican who had examined the boy on 25 July 1977.

> **On examination**
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> He had scars as follows:
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> (i) a scar 1" long on the chin.
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> (ii) a scarred area 11" x 2" extending over the whole length of the left chin.

(iii) three scarred patches on the right thigh where skin had been removed for grafting to the left leg - two patches were 4" x 3" and one 3½" x 2½.

He walked with a limp because of a left foot drop.

He was unable to raise the left foot at the ankle because of damage to the muscles and tendons.

The left calf was wasted, its girth being ½" smaller than the right.

Opinion

The scars, the left foot drop and the resultant limp were caused by his injuries and will be permanent.

Surgery may improve the foot drop to some extent. However, because of the extensive scarring of the muscles and tendons in front of the leg, the improvement achieved is likely to be limited."

The major disability the boy has is what Mr. Merican describes to raise the foot at the ankle; it remained at 10° below the horizontal. The range at the right foot was 45°. This disability resulting from the tearing of the tissues of the leg, caused the boy to limp and incapacitates him from "athletic and similar activities". Mr. Paraman, another surgeon, who also examined the boy did not like the use of the words "foot drop" which he says could refer to a total paralysis of the extensions of the ankle which was not the case here. The loss of extension in his view is of the great toe only. Both the experts substantially agree with each other's views that there is this loss of extension which causes the limp and which is permanent. Both agree that there is some albeit slight difference in the length of the legs of the boy.

Fortunately for the boy the fractures united well.

In *Paramasivam & Anor. v. Abdul Aziz & Ors.* [1976] 2 MLJ 91 where another young boy suffered injuries (more extensive than in the instant case) to his right leg resulting in skin grafting and disabilities to the ankle and shortening of right leg and "total deformity" of the right foot and the loss of various bones of the right foot, the Court awarded in May 1975 RM38,000 at 100% liability. Against his case my attention was drawn to an unreported 1979 judgment of the Muar High Court (*Hapiz bin Abd. Manaf v. Pang Swee* - Civil Suit 161/75) where as the result of fractures of the tibia and fibula a young man of 20 years was left with half inch shortening of the injured leg, wasting of calf muscles and disabilities to ankle movements that permanently incapacitated him from sports and games and for work requiring heavy lifting or prolonged walking or standing. In that case the plaintiff was awarded only RM10,000 by way of general damages.

In considering the degree of severity of both the injuries and the resulting disabilities suffered by the respective claimants in those two cases, it seems to me that the awards made are not irreconciliable. For the injuries to the legs a discernable trend in the quantum of the awards can be seen from the reported judgments with adjustments made by the Judges concerned to compensate for the greater severity of the pain and suffering and permanent disability.

Following what I see as a trend and guided by that and having in mind that some 6 years have passed since the judgment in the Paramasivam's case was delivered, I would award for the hideous disfigurement that is the scarred area on the leg and thighs RM12,000. The scarred area on the left lower leg was 11" by 2" without keloid adherent to the underlying bone and the outer portion adherent to the underlying tendon. The inner portion showed two grafted areas 4" by 3" and 3½" by 2½". There were scars on the donor area on the thigh.

For the fracture and for the disability to the ankle I would award RM12,000. I consider that any amount that I may award for the injury to the chin would merge with the compensation awarded for the other injuries.

Since all the injuries were inflicted in the one incident and since the 1st plaintiff experienced the pain and suffering for all of them over the same period there must be a reduction of the aggregate amount to compensate for overlapping. Accordingly in my judgment for pain and suffering and loss of amenities as a result of all injuries I would award RM20,000.

It was urged on me that I should also make an award for loss of earning power. This certainly can be a head of damages. (See *Mohamed Ikhawan v. Johar & Anor*. [1966] 1 MLJ 180). At the trial, the 1st plaintiff though 15 years of age was only a Form 1 pupil. There is no suggestion that his slow progress in school had anything to do with the accident. His parents apparently are rubber tappers and it would seem that he was and is destined to a life of manual work.

I observe that while each of the surgeons in their reports on the 1st plaintiff have specifically mentioned that he would be incapacitated from athletic activities (which as a loss of amenity I have considered in computing the earlier amount), no mention is made of any incapacity in undertaking manual work. A slight limp (which is what the boy has) and the hideous scars do not suggest to me any substantial loss of earning capacity. Considering that he is still pursuing with his studies and had not offered himself into the labour market brings to mind the various contingencies that have to be taken into account that would water down any award made under this head. It seems to me that an award of RM4,000 should be adequate under this head arrived at on the basis of a 10% loss of earning power having in mind that a manual worker without disability earns say an average of RM300 a month.

Counsel had informed me that agreement had been reached on special damages claimed by the 2nd plaintiff at RM150 and as liability had been admitted by the defendant on a 100% basis there will be judgment for the 1st plaintiff in the sum of RM24,000 together with interest on RM20,000 thereof at 6% per annum from date of service of the writ until judgment and at 8% per annum on the whole judgment sum from date of judgment until realisation. There will be judgment for the 2nd plaintiff in the sum RM150. The defendant will also pay the costs of the 1st plaintiff. Of the judgment amount to the 1st plaintiff, RM18,000 is to be deposited in fixed deposits in a bank and held there until he attains the age of 18 years. The balance shall be paid to his father Lim Kwee Fong.

Also found at [1982] CLJ 253